Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

RONALD FRYER,
Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari
to the Workers' Compensation Appeals Board
of the State of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the free speech provisions of the First Amendment protect from prosecution for contempt, ordinary citizens appearing as pro se litigants, when their written pleadings containing statements critical of the court are filed outside the court's presence and do not interfere with the court's proceedings.

2) Whether an administrative agency, empowered to prosecute parties before them for contempt, violates the Due Process Clause of the Fourteenth Amendment, in denying an accused contemnor the right to a fair hearing, including the right to present witnesses in his own defense.

LIST OF PARTIES

1) RONALD FRYER, Petitioner

2) WORKERS' COMPENSATION APPEALS BOARD, Respondent

3) CORNUCOPIA COMMUNITY MARKET & TRAVELERS INSURANCE, Defendants in related matter of Ronald Fryer v. Cornucopia Community Market and Travelers Insurance, WCAB Case No. SAL 75781

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that it has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The California Supreme Court denied Petitioner's Petition for Writ of Certiorari (App., *infra*, 1). The California Court of Appeal, Third Appellate District, denied Petitioner's Petition for Writ of Certiorari (App., *infra*, 2). The writ denial is reported at Ronald G. Fryer v. Workers' Compensation Appeals Board, et al, 70 Cal. Comp. Cases 247 and is reprinted in the Appendix hereto, pp. 3-10. The Workers' Compensation Appeals Board's Opinion And Order Denying Reconsideration was unreported. (App., *infra*, 11-17). The original Findings of Fact; Order, Judgment and Decree of Contempt of the California Workers' Compensation Appeals Board ("WCAB") is unreported. (App., *infra*, 18-35).

JURISDICTION

The WCAB entered its Order, Judgment and Decree of Contempt on July 8, 2004 (App., *infra*, 18-35). Petitioner's timely Petition for Reconsideration filed with the WCAB was denied in its Opinion and Order Denying Reconsideration on September 27, 2004 (App., *infra*, 11-17). Petitioner's timely Petition for Writ of Certiorari was summarily denied review by the California Court of Appeal, Third Appellate District on January 13, 2005 (App., *infra*, 2). Petitioner's timely Petition for Review was summarily denied review by the California Supreme Court on March 2, 2005 (App., *infra*, 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

First Amendment To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourteenth Amendment To The United States Constitution, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fifth Amendment To The United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor

be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

California Code Of Civil Procedure, Section 1209 (in pertinent part)

(a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding;

8. Any other unlawful interference with the process or proceedings of a court;

(b) No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceeding.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

Petitioner sustained an injury to his lumbar spine, cervical spine, knees and elbows on 1/2/97, while employed as a produce clerk by Defendant, Cornucopia Community Market. On 4/17/97, while still totally disabled and unable to work, Petitioner's employment was terminated. Petitioner filed an Application for Adjudication of Claim, alleging that his injuries were work related and seeking workers' compensation.

Defendant Travelers Insurance accepted Petitioner's lumbar injury as work-related, but upon learning the severity of the lumbar injury that has left Petitioner totally disabled sought to severely limit Petitioner's benefits and treatment through the use of highly inaccurate and misleading medical reports prepared by their hired doctor, Dr. Geoffrey Miller.

Petitioner, acting in pro per, was forced to resort to protracted litigation to secure and recover his benefits. But the Board repeatedly relied on Dr. Miller's reports while rejecting the overwhelming volume of objective medical evidence and consensus opinion of numerous orthopedic specialists and two treating physicians flatly contradicting Dr. Miller's assessment that Petitioner only suffered a "muscle sprain." Ruling in favor of the defendants left the Petitioner homeless, penniless and his injuries untreated.

Four different workers' compensation administrative law judges who have presided over this case are now under investigation for misconduct by the Division of Workers' Compensation's Ethics Advisory Committee following Petitioner's written complaints regarding their misconduct in this case. Petitioner's complaints have included allegations of outright

insurance fraud being committed by the judges, and perjury on the part of two of the judges - Judge Thomas Clarke and Judge Gregory Cleveland.

On October 27, 2003, Petitioner filed with the clerk and outside of the Board's presence a *Petition to Remove Judge Cleveland's Order to Show Cause Motion Denial*, wherein Petitioner referred to Workers' Compensation Administrative Law Judge ("WCJ") Gregory Cleveland as a "crooked judge" who had knowingly broken the law by illegally denying Petitioner's Order to Show Cause Motion ("OSC").

Judge Cleveland had refused for over four months to make a ruling on the OSC motion. The OSC motion would have forced the defendant's doctor, Dr. Miller, to produce medical records the doctor had claimed since 1999 he'd reviewed and relied on to write his reports that enabled his client, Travelers Insurance to escape liability for Petitioner's workplace injury. The doctor and Travelers insisted the records exist but they both have steadfastly refused since 1999 to identify or produce the supposed records - in violation of the law.

Despite this, Judge Cleveland was the fourth judge in this case to frustrate Petitioner's attempts to force the doctor to produce the supposed records he was bound by law to identify when he wrote the medical reports. (Exhibit I to Petition at pp. 83-105, 114-135.)[1] It was Judge Cleveland's denial of that OSC motion that Petitioner sought to appeal through his October 27, 2003 Petition to Remove.

On March 2, 2004, the Board issued its *Opinion and Order Denying Petition For Removal*. Therein the Board also stated that they had noted in their August 28, 2002 *Order Denying Petition for Removal* that "*certain statements made by the applicant in his petition were*

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[1] This and subsequent references to the "Petition" throughout this Writ Petition refer to the original "Appendix of Exhibits" attached to Petitioner's "Petition for Writ of Review/Certiorari filed on November 15, 2004 with the California Court of Appeal, Third Appellate District.

contemptuous and that a continuation of such conduct may result in sanctions and/or contempt. (Lab. Code, §134, 5813, Cal. Code Regs., tit. 8, §10348, 10561.)" The Board further stated that it found that some of the language in Petitioner's October 27, 2003 petition "may be contemptuous" and that they would address the issue in the future. (Exhibit L to Petition at p. 145.)

B. The Board's Contempt Citation

On March 19, 2004 the Board served Petitioner by mail with their contempt *Accusation, Citation and Order to Show Cause.* The Accusation alleged Petitioner had committed "one count of contempt, pursuant to Code of Civil Procedure section 1209 (a) 1 and/or 8, for the language used in the petition for removal, filed with the Appeals Board on October 27, 2003, after the failure to obey the Board's warning that such language is contemptuous." A hearing date was set for May 5, 2004. (Exhibit M of Petition at pp. 154-155.)

C. The Pretrial Proceedings

By April 24, 2004, Petitioner had served witness subpoenas to appear at the May 5th Contempt hearing on Board Commissioners Rabine, Brass and Murray; WCJs Clarke, Hurley and Cleveland; Administrative Director Richard Gannon, Travelers Insurance's claims representative, Donna Magallanes, and the defendant's doctor, Dr. Geoffrey Miller, to testify. Petitioner sought to prove that the statements the Board alleged were contemptuous were in fact true and that Judge Cleveland, under investigation for misconduct by the Ethics Advisory Committee, is in fact a corrupt judge. (Exhibit N of Petition at p. 157.)

On April 26, 2004, the Department of Industrial Relations served Petitioner with motions to quash the witness subpoenas Petitioner had served on the Board

Commissioners, the WCJs, and the Administrative Director arguing that none of the witnesses were percipient witnesses "to any material fact concerning the merits of Mr. Fryer's claim for workers' compensation benefits." (Exhibit O of Petition at pp. 172-202.)

On April 27, 2004 Petitioner sent Commissioner Cuneo a letter by overnight express mail alerting the Commissioner to Petitioner's intent to file objections to the motions to quash Petitioner's witness subpoenas, demanding a hearing on each and every motion to quash Petitioner's witness subpoenas, requesting a continuance of the May 5, 2004 hearing date pending the completion of the Department's pretrial motions, and expressing the hope that the commissioner didn't deny Petitioner his state and federal Constitutional due process rights by granting the Department's motions to quash the witness subpoenas prior to receiving Petitioner's objections and conducting hearings on the Department's motions to quash. (Exhibit P of Petition at p. 203)

Two days later, on April 29, 2004, Petitioner served by FedEx Express overnight mail, copies of his pleadings in opposition to the Department's petitions for orders quashing Petitioner's witness subpoenas Petitioner had served on the Board Commissioners, the WCJs and the Administrative Director. Petitioner argued that the "Workers' Compensation Appeals Board is bound by the due process clause of the U.S. Constitution, Fourteenth Amendment, to give the parties before it a fair and open hearing." (Exhibit R of Petition at pp. 218, 230, 262.)

On April 30, 2004, two hours before Commissioner Cuneo received Petitioner's opposition pleadings, Commissioner Cuneo's signed *Orders Granting Motions to Quash Subpoenas* were faxed to the Petitioner - the subpoenas Petitioner had served on the Commissioners, the WCJs and Administrative Director Richard Gannon.

Accompanying Commissioner Cuneo's signed orders was his April 30, 2004letter to Petitioner, denying Petitioner's request for a continuance of the hearing date. (Exhibit S of Petition at p. 270.)

On May 3, 2004, Petitioner served his *Respondent's Answer to Accusation, Citation and Order to Show Cause*, wherein he argued no contempt had been committed since the Accusation did not even contain an allegation that an "order" of the Board had been violated.

Petitioner's *Answer* further argued that Code of Civil Procedure §1209(b) prohibits punishing for contempt any speech or publication reflecting upon or concerning any court or court officer "unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings." Therefore, Petitioner argued, the Board lacked jurisdiction to prosecute Petitioner under Code of Civil Procedure §1209(a) 8 because the Petitioner's Petition for Removal was filed outside of the Board's presence and because the Board's Accusation "has not alleged any facts evidencing interference with the proceedings of the court whatsoever."

D. The Contempt Hearing

On May 5, 2004, WCAB Commissioner Cuneo presided over the contempt hearing. The transcript of the *Minutes of Hearing* and *Transcript of the May 5, 2004 hearing in Misc. No. 246* were prepared on May 6, 2004. (Exhibit X to Petition at p. 310.)

Petitioner made a series of pretrial motions at the May 5, 2004 hearing. Petitioner's first motion was a *Petition to Disqualify Assigned Workers' Compensation Appeals Board Judge (Commissioner James Cuneo)*, pursuant to California Labor Code §5311 and the WCAB Rules of Practice and Procedure §10452, alleging bias on the part of the Commissioner. (Exhibit Y of Petition at p. 353.)

Commissioner Cuneo stated Board Rule 10452 only applied to workers' compensation judges and not to Board Commissioners, and therefore Petitioner's Petition to Disqualify was being denied and the hearing would proceed. (Exhibit X of Petition at 317:1-12.)

Petitioner next stated he wanted the Board to find the defendant's hired doctor, Dr. Geoffrey Miller, in direct contempt for refusing to appear as ordered by subpoena. The judge refused to do so. (Exhibit X to Petition at pp. 328:11-329:4.)

Petitioner then stated:

> "This goes forward under protest, under the strongest protest. This hearing, I believe, is illegal, and I've been denied due process and will certainly go to appeal." (Exhibit X to Petition at p. 329:5-8.)

The judge asked Petitioner if he had any evidence or testimony to present. Petitioner stated the judge had taken away his witnesses and thus his trial. (Exhibit X to Petition at pp. 347:6-348:5.)

E. The Post-Hearing Proceedings

On May 12, 2004, one week after the contempt hearing and on the stated advice of Commissioner Cuneo at the hearing, Petitioner served a motion requesting the Board seek an order to show cause why Dr. Miller should not be held in contempt for his refusal to appear at the contempt hearing as he was required by subpoena. (Exhibit Z to Petition at p. 358.) Commissioner Cuneo, in his July 8, 2004 Order, Judgment and Decree of Contempt, refused to rule on the motion he himself had advised Petitioner to file, claiming he considered "the issue moot." (Exhibit A to Petition at p. 3, fn.1.)

The special prosecutor filed a *Closing Argument* on June 2, 2004, acknowledging that the cases she and the Board had been citing in their prior pleadings

concerned instances of *direct* contempt. (Exhibit CC to Petition at p. 655).

Petitioner served by mail his *Respondent's Closing Argument* on June 12, 2004. Therein Petitioner reiterated that it was a legal impossibility to be charged with contempt under §1209(a)(1) since the Board never alleged Petitioner committed a direct contempt. (Exhibit DD to Petition at p. 666.) Petitioner pointed out no evidence had been presented showing that a contempt had been committed, that the prosecutor had not shown that Petitioner's alleged "contemptuous" statements were untrue, and that the Constitutions of California and the United States of America guaranteed Petitioner's right to make the statements as protected free speech. (Exhibit DD to Petition at p. 669.)

Petitioner again argued that Petitioner's due process rights had been denied with the denial of his right to present witnesses in his defense and were further violated at the hearing by Commissioner Cuneo who chose to himself rule on Petitioner's motion to disqualify the Commissioner.

F. The Board's Contempt Decree

Commissioner Cuneo issued his *Findings of Fact; Order, Judgment and Decree of Contempt* on July 8, 2004, finding Petitioner guilty of violating Code of Civil Procedure §1209 (a)(1) and (8). (App., *infra*, p. 18-35.) The Commissioner stated the Board has no procedure governing a Petition to Disqualify a Commissioner sitting as a judge in a hearing before the Board, and that he "concluded it was best to proceed with the hearing recognizing that while there was no procedure (Petitioner) maintained his right to appeal on this issue..." (App., *infra*, p. 20.)

Commissioner Cuneo dismissed Petitioner's First Amendment free speech rights argument by stating that "there was no order restricting Ronald Fryer's freedom of speech." Rather, he stated, that

herein "there was a warning that certain behavior including language used may subject him to contempt and or sanction proceedings." He stated he was holding Petitioner "accountable to the law for what he speaks, what he writes, and what he publishes," but he failed to enunciate what "law" Petitioner was being held accountable to. (App., *infra*, p. 33.)

G. The Petition For Reconsideration Proceedings

Petitioner filed with the Board his *Petition for Reconsideration* on August 2, 2004. Therein Petitioner again argued that Petitioner's written statements were protected as free speech under the First Amendment, discussing several of the United States Supreme Court decisions, i.e., *Bridges v. California* (1941) 314 U.S. 252 and *Craig v. Harney* (1947) 331 U.S. 367. (Exhibit B to Petition at pp. 15, 39-45.)

Petitioner also argued that he'd been denied his "federal and state Constitutional procedural right of due process to a fair hearing." (Exhibit B to Petition at pp. 47-63.)

The special prosecutor, Judy Dick, filed an *Answer to Petition for Reconsideration* on August 9, 2004. Therein she continued to cite ancient cases that preceded the First Amendment free speech United States Supreme Court opinions in the 1940s, and she still would not explain how Petitioner's petition for removal not filed in open court constituted contempt in the light of those Supreme Court cases, which she still refused to even discuss. (Exhibit C to Petition at p. 69.)

The Board issued its *Opinion and Order Denying Reconsideration* on September 27, 2004. (*App., infra*, pp. 11-17.) Therein the Board all but admitted that there was no factual basis for finding Petitioner guilty of contempt under Code of Civil Procedure §1209(a)(1), stating:

> "(E)ven assuming arguendo that Code of Civil Procedure section 1209(a)(1) concerns only

"direct contempts," i.e., those made in open court, Mr. Fryer was still properly found guilty of *one* count of *indirect* contempt." (*App., infra,* p. 13.)

The Board clung to the remaining count under §1209(a)(8), but did not point to any evidence that Petitioner's allegedly contemptuous pleading had interfered with any proceedings of the Board. (*App., infra,* p. 13)

The Board asserted Petitioner had no First Amendment free speech rights under this Court's decisions, claiming the United States Supreme Court case, *Bridges v. State of California* (1941) 314 U.S. 252, and *Turkington v. Municipal Court* (1948) 85 Cal.App.2d 631 were "not on point" because they involved "out of court statements." (*App., infra,* p. 14.)

The Board simply adopted Commissioner Cuneo's unsupported finding that "(n)one of the (subpoenaed witnesses) can offer relevant testimony on the allegations presented in the Accusation." (*App., infra,* pp. 15-16) The Board also sought to misstate Petitioner's attempt to mount a defense, and miscast Petitioner's witness subpoenas as "an opportunity for (Petitioner) to litigate his underlying case and/or address the alleged persecution he apparently perceives." (*App., infra,* pp. 16.)

H. The California Appellate Court Proceedings

Petitioner filed a *Petition for Writ of Review or in the Alternative Writ of Certiorari* in the California Court of Appeal, Third Appellate District, on November 12, 2004. Therein, at page 29, Petitioner again raised the issue of his First Amendment free speech rights. Petitioner also raised the issue of the Board having deprived Petitioner of his property and his right to present a defense without due process under the Fifth, Sixth and Fourteenth Amendments of the Constitution at pages 7 and 62 of his Writ Petition.

The Board served its *Answer to Petition for Writ of Review or in the alternative Writ of Certiorari* ("Answer") on December 14, 2004. The most notable line in their *Answer* is:

> "The case of *Bridges v. State of California, Times-Mirror* (1941) 314 U.S. 252 [62 S.Ct. 190] argued by Petitioner regarding freedom of speech, is not on point." (Answer at p. 12:17-20.)

This was the sum total of the Board's argument that Petitioner has no First Amendment free speech rights as defined in the landmark decisions handed down by our highest court. The Board also provided in their December 14, 2004 *Answer* the very first assertion of what "proceeding" that Petitioner's October 27, 2003 petition for removal had allegedly interfered with. The Board claimed Petitioner's October 27, 2003 petition for removal had interfered with the Board's proceedings under Labor Code section 1209(a) 8, stating:

> "(T)he proceedings of the Appeals Board were interfered with because the Board had to issue a contempt citation, hold a contempt hearing and render a decision on contempt, all of which are proceedings outside of and in addition to its main function of adjudicating workers' compensation cases regarding employees that are injured arising out of and in the course of employment." (*Answer* at p. 9:2-6.)

Petitioner filed a *Reply to Answer to Petition for Writ of Review or in the Alternative Writ of Certiorari* on December 27, 2004. Petitioner's *Reply* provided a further recitation of the facts of this case as a response to the inaccurate history advanced by the Board in their *Answer*. Petitioner's *Reply* also addressed the fact that the Board had apparently abandoned any further

defense of their finding that Petitioner had violated §1209(a)(1). (Petitioner's *Reply to Answer*, pp. 11-16)

Petitioner's *Reply to Answer* also addressed the fact that the Board's *Answer* was the first time the Board had actually enunciated just what Board proceedings Petitioner's October 27, 2003 Petition for Removal allegedly interfered with, but that they still didn't point to any actual proceedings that had been interfered with. Rather they claimed the fact that they felt they had to initiate contempt proceedings took them away from their "main function of adjudicating workers' compensation cases."

Petitioner argued that not only was their argument meritless, but also a further violation of due process since they had never alleged in their *Accusation*, nor made any findings of fact in their Contempt Decree that some unnamed "proceedings" of the Board had been interfered with by their having to drop what they were doing to initiate contempt proceedings. (Petitioner's *Reply to Answer*, pp. 26-29.)

The Court of Appeal summarily denied Petitioner's writ on January 13, 2005. (App., *infra*, 2). Petitioner filed a timely *Petition for Review* in the California Supreme Court on January 24, 2005. Petitioner again argued that his First Amendment and Fourteenth Amendment rights to free speech and due process had been violated. The California Supreme Court summarily denied review on March 2, 2005. (App., *infra*, 1).

REASONS REVIEW SHOULD BE GRANTED

The summary denial of Petitioner's writ by the Third Appellate District of the Court of Appeal and the summary denial by the California Supreme Court let stand a ruling by the Workers' Compensation Appeals Board that clearly conflicts with the Supreme Court's First Amendment free speech rulings dating back to

this Court's 1941 holding in *Bridges v. State of California* (1941) 314 U.S. 252.

Mr. Justice Black, writing for the majority in *Bridges*, stated, "(F)ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." Indeed. And this case presents the fact that both of these cherished policies are under attack in the State of California. This Board Commissioner found Petitioner guilty of contempt despite the complete lack of any evidence, and the Board has adamantly refused to recognize this Court's First Amendment holdings as controlling in this case. The Board also upheld the trial judge's repeated denial of this Petitioner's due process rights to a fair hearing guaranteed by the Fifth, Sixth and Fourteenth Amendments.

The Commissioner quashed Petitioner's witness subpoenas before even considering Petitioners' objections to those motions to quash. The Commissioner refused to hold a hearing on those motions to quash as Petitioner had demanded, and refused to grant a continuance of the hearing date until the pretrial motions had been fully adjudicated. The one subpoenaed witness, Dr. Geoffrey Miller, for whom no motion to quash had been granted simply chose not to appear, and the Board condoned his open contempt for the Board's proceedings by choosing not to prosecute him - caring not that his failure to appear further denied Petitioner's right to present witnesses in his defense and thus a fair hearing. The Commissioner sitting as trial judge then himself ruled on Petitioner's Petition to Disqualify and predictably denied the motion claiming the Board has no rules for challenging a Commissioner sitting as a judge in a Board proceeding.

The California Supreme Court's and the California Court of Appeal's denial of Petitioner's Petition for Writ of Certiorari has given the Board a green light to continue this assault on the most basic of

our freedoms. The publication of this writ denial in California Compensation Cases is citable authority in every other workers' compensation case. In denying Petitioner's writ, the Third Appellate District and the California Supreme Court are telling the most vulnerable and weakest in our society - the injured workers subject to this Board's jurisdiction - - that they no longer enjoy First Amendment free speech protection, nor the Fourteenth Amendment's guarantee of due process rights in workers' compensation proceedings.

ARGUMENT

A. Review Is Warranted Because The Board's Contempt Decree Conflicts With This Court's First Amendment Free Speech Holdings Dating Back To *Bridges V. State Of California*, Article I Of The California Constitution, And California Code Of Civil Procedure §1209(b).

The United States Supreme Court settled any question still remaining regarding the extent of free speech protection when they narrowly restricted the power to punish summarily for constructive contempts in a series of decisions dating back to *Bridges v. State of California* (1941) 314 U.S. 252. (See also *Pennekamp v. Florida* (1946) 328 U.S. 331; *Craig v. Harney* (1947) 331 U.S. 367; *Wood v. Georgia* (1962) 370 U.S. 375; *In re Little* (1972) 404 U.S. 553.)

Those decisions held that the criticism of a judge's conduct by false charges, intemperate language, and unfair aspersions, no matter how strongly expressed, does not constitute constructive contempt unless it gives rise to an immediate, clear, and present danger of obstruction of the administration of justice.

The Board never alleged, never provided any evidence of, and never made a finding that Petitioner's

pleading "gave rise to an immediate, clear, and present danger of obstruction of the administration of justice." They simply asserted as a conclusion of law that Petitioner's statements in a petition for removal filed outside of the court's presence by an ordinary citizen owing no special duty to the court as an "officer of the court," constituted an indirect contempt of court.

This conviction, so totally devoid of evidentiary support, rendered the conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment. (See *Thompson v. City of Louisville* (1961) 368 U.S. 157.) Because the Board's error is so clear and their finding so devoid of evidentiary support, Petitioner respectfully submits that the Court may wish to summarily reverse the Board's Decree of Contempt.

The Board flatly refuses to even acknowledge that they are obliged to follow this standard set down in the United States Supreme Court decisions for alleging and proving the existence of a constructive contempt. They dismissed this Court's *Bridges* holding as "not on point" because it "involved out of court statements." When Petitioner countered in his Writ pleading that the reach of this Court's holdings in *Bridges* and *Craig v. Harney* extended into the courtroom in the case of *In re Little* (1972) 404 U.S. 553, the Board's response in their Answer was the curt and wholly inadequate response:

> "The case of *Bridges v. State of California, Times-Mirror* (1941) 314 U.S. 252 [62 S.Ct. 190] argued by Petitioner regarding freedom of speech, is not on point." (*Answer* at p. 12:17-20.)

The Board offered no argument as to why they felt the *Bridges* holding "is not on point." Instead, they simply keep repeating that they have an inherent right to punish, unaffected by constitutional guarantees of freedom of speech and the press, as a contempt an act - whether committed in or out of its presence - which

tends to impede, embarrass or obstruct the court in the discharge of its duties.

They base this right to protect their "dignity" on the "inherent necessity" doctrine stated as dictum in *In re Shortridge* (1893) 99 Cal. 526. According to the outdated theory, it was a "necessary incident to the execution of the powers conferred upon the court" - "necessary to maintain its dignity, if not its very existence."

California Supreme Court Justice J. Edmonds', well-reasoned dissent in *Bridges v. Superior Court* (1939) 14 Cal.2d 464, 495, traced the history of this theory back to the opinion of an English judge written in the 1760s in an undecided case that was given the authority of a precedent in the United States. Justice Edmonds stated that "it now appears that in this branch of the law, the courts have built a structure of judicial reasoning upon the sands of precedents which do not exist." (*Bridges v. Superior Court, supra* at p. 495)

Justice Black, writing for the majority in *Bridges v. State of California,* noted, in overturning the California Supreme Court's *Bridges v. Superior Court* holding, that "for us to assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press'." (*Bridges v. State of California, supra* at p. 264) The Workers' Compensation Appeals Board would have us return to this ancient theory despite this Court's clear renunciation of the doctrine more than sixty years ago.

This area of law is not controversial. This issue was well settled long ago, and California's courts have recognized and followed these United States Supreme Court decisions for many decades.

In 1948, the First Appellate District of the California Court of Appeal stated in *Turkington v. Municipal Court* (1948) 85 Cal.App.2d 631:

> "(T)he holdings of the United States Supreme Court are binding on this court insofar as they constitute an interpretation of the federal Constitution. These holdings are based on the fundamental concept that the right of free speech is essential in a democracy, and should not be limited by the use of the contempt process except where there is a real impediment to the orderly administration of justice." (*Turkington, supra,* at p. 650-651.)

Not only is the Board's Contempt Decree in direct conflict with this Court's holdings, it directly conflicts with California statutory law, and California case law dating back nearly 100 years.

California Code of Civil Procedure §1209(b) states:

> "No speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such manner as to actually interfere with its proceedings."

Nearly 100 years ago, the California Supreme Court Court, in the case of *Matter of Shay* (1911) 160 Cal. 399, held that CCP §1209(b) protects from charges of contempt ordinary citizens who didn't owe a duty to the court - as do attorneys as officers of the court. The *Shay* court stated:

> "The amendment of 1891 was passed with different acts and persons in view, and to accomplish a different purpose. It was not intended to affect the power of the court to deal with its own officers for acts of disrespect in

> connection with their official position... Its purpose obviously was to prevent the punishment of ordinary citizens, not connected with the court nor owing to it any special duty of fidelity and respect, for any "speech or publication," in censure or abuse of the court or the justices thereof, made to other persons, or to the general public, or even to the justices themselves, in the exercise of the common privilege of free speech." (*Shay, supra* at 406-407. Emphasis added.)

The Board was unable to refute this clear statement of the California Supreme Court regarding Code of Civil Procedure §1209(b). Not once has the Board even mentioned the *Shay* holding throughout their entire prosecution of this Petitioner despite Petitioner's repeated reference to the case. Nor could they offer even one single case to support their claim that out of court statements in a written pleading by an ordinary citizen constituted a contempt of court. Every case they cited concerned either documents filed in open court and/or filed by an attorney owing a special duty to the court as officers of the court.

The Board went to extraordinary lengths to try to fit their prosecution into the confines of the Civil Procedure statute concerning contempt. They prosecuted Petitioner under §1209(a)(1) for indirect contempt when that subsection of the statute only concerns instances of direct contempt. The Board did not refute Petitioner's argument and accusation that they altered the wording and meaning of §1209(a)(1) in their pleadings. (See Petitioner's *Petition for Writ of Review*, pg. 36-39.) And as Petitioner pointed out in his Statement of the Case, the Board abandoned any defense of their conviction of Petitioner under §1209(a)(1) of the Code of Civil Procedure.

Nor did the Board refute Petitioner's argument that they had intentionally misstated the holding of a

particular direct contempt case, *Blodgett v. Superior Court* (1930) 210 Cal. 1, by patching together carefully selected passages out of context to give it a new, unintended meaning in order to try and claim it applied to this alleged indirect contempt. The Board relied on this case despite the justices' specific admonition in the *Blodgett* holding that it only applied to direct contempt. (See Petitioner's *Petition for Writ of Review*, pg. 33-36.)

It was clear from the start that the Board's prosecution had no merit. Their Contempt Decree clearly conflicts with the First Amendment right of free speech, this Court's numerous First Amendment free speech cases dating back to the 1940s, Article I of the California Constitution, the California Supreme Court's holding in *Matter of Shay*, and California Code of Civil Procedure §1209(b). There was no evidence that the language used by Petitioner in his petition for removal violated Code of Civil Procedure §1209(a) 1 or 8, and thus the conviction was also unconstitutional under the Due Process Clause of the Fourteenth Amendment.

B. Review Is Warranted Because The Board's Contempt Decree Conflicts With The Due Process Clause Of The Fourteenth Amendment, This Court's Holding in *Bloom v. Illinois*, And Article 1 Of The California Constitution That Required This Board To Afford This Party Accused Of Contempt The Right To A Fair Hearing

> "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested,

and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed. (*Bloom v. Illinois* (1968) 391 U.S. 194.)

The denial of Petitioner's Sixth and Fourteenth Amendments due process right to a fair trial was insured even before Petitioner's contempt hearing. Commissioner Cuneo granted his special prosecutor's motions to quash Petitioner's witness subpoenas before even considering this Petitioner's objections to those motions to quash, and in denying Petitioner his right to be heard on the motions to quash, as demanded by this Petitioner in his April 27, 2004 letter to Commissioner Cuneo (Exhibit P to Petition at p. 203-206), and demanded again in Petitioner's objections to the motions to quash his witness subpoenas. (Exhibit R to Petition at p. 217-269)

The Board, in charging Petitioner with contempt, was obliged to allow Petitioner to offer evidence and call witnesses in his defense prior to being sentenced. Petitioner had an absolute right to disprove the special prosecutor's allegations that Petitioner's allegedly contemptuous statements were made in "bad faith" by proving the statements (i.e., Judge Cleveland is indeed a corrupt judge) are in fact true.

The Board was not about to allow this to happen. After all, the Division of Workers' Compensation's Ethics Advisory Committee has found enough merit in Petitioner's written complaint to them to warrant an investigation of Judge Cleveland (as well as the three previous presiding judges) for misconduct in this case .

Commissioner Cuneo stated:

"Whether or not any of the above individuals are crooks is not the issue at hand. ...I find that

(Mr. Fryer's) behavior in and of itself, consisting of using such statements after specific warning, is contemptuous conduct without consideration as to the truth of the statements." (*App., infra*, pp. 22, 32.)

Besides preventing Petitioner from putting on a defense, Commissioner Cuneo has misstated the law. This Court's holdings dating back to *Bridges* put an end to punishing by contempt "for comment on pending cases in absence of a showing that the utterances created a 'clear and present danger' to the administration of justice." (*Craig v. Harney* (1947) 331 U.S. 367.) "Trial courts...must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice." (*Brown v. United States* (1958) 356 U.S. 148, 153.)

In denying Petitioner's subpoenas, the Board argued that the witnesses Petitioner subpoenaed were not "percipient" witnesses, while their special prosecutor simultaneously argued that the statements contained in Petitioner's pleadings concerning those witnesses were made in "bad faith." Yet the Board denied Petitioner the ability to prove that the statements were not made in "bad faith" by denying him his right to call these witnesses to prove the truth of the written statements critical of Judge Cleveland in Petitioner's petition for removal, filed out of the court's presence, that the Board argued were "contemptuous."

The Board's special prosecutor successfully moved the court at the Contempt hearing to take judicial notice of Petitioner's entire Board file (App., Exh. X at 343:25-344:2). Yet Commissioner Cuneo's quashing of Petitioner's witness subpoenas prior to the trial prevented Petitioner from putting forth a defense of the written statements Petitioner filed outside of court in that enormous file that were used against him, thus denying his due process right again.

Even if the testimony of the witnesses Petitioner subpoenaed to prove the truth of Petitioner's statements the Board deemed "contemptuous" was somehow not relevant to the issue of Petitioner's complete exculpation, this Court's holding in *Bloom* makes clear that due process demanded that Petitioner should have been allowed to present the witnesses to speak to the issue of the extenuation of the offense and in mitigation of the penalty to be imposed. After all, the Board specifically found that Petitioner "has offered no excuse and no apology" for actions the Board asserted were "serious and flagrant and on their face meant to challenge the authority of the WCAB." (*App., infra*, p. 34) That is rather like accusing someone of a crime, gagging them while you inquire why they committed the crime, and then concluding they refused to respond to your inquiries as you found them guilty of the crime. Had Petitioner been allowed to prove that Judge Cleveland had knowingly broken the law repeatedly in Petitioner's workers' compensation case to Petitioner's repeated detriment, it would have provided the court with an understanding of why this Petitioner would venture to use such forceful language in a petition seeking to overturn his orders.

The Board's findings that Petitioner's "actions" were meant to "challenge the authority of the WCAB" were not supported by any evidence, but worse still, in making that finding the Board denied Petitioner due process when they prevented the Petitioner from offering any evidence disproving it.

This Board further denied this Petitioner due process to which every injured worker, and every litigant that comes before the Board, is entitled. Every other party in a proceeding before the Board is entitled to challenge the sitting judge by way of a motion to disqualify. Petitions to Disqualify in workers' compensation proceedings fall under the provisions of Labor Code §5311 and Workers' Compensation Appeals Board Rules of Practice and Procedure section

10452. Yet this Petitioner's disqualification petition was denied by the Commissioner himself. But it was not for Commissioner Cuneo to make that determination at the hearing. Under Rule 10452 it was for a three-member panel of the Board to make that determination. Commissioner Cuneo claimed that the Board has no rules for challenging a Commissioner sitting as a judge in a Board proceeding, and refused to disclose what rules did apply to him when repeatedly questioned by Petitioner at the hearing. Not only was this a denial of due process but of equal protection as well. Due process would be nonexistent if there were no method to challenge a Board "Judge" but only an administrative law "judge."

The Board simply prevents the removal of a Commissioner for bias when he or she sits as judge in a Board proceeding by refusing to promulgate any rules for this situation. But the Board has been aware for decades that the Board has the right to remove to itself the proceedings on any claim under Labor Code §5310. They are also aware that they are mandated to promulgate rules necessary to implement the legislation granting them their judicial powers.

"The Legislature has given the Board broad powers to enact rules of practice and procedure as well as specific statutory authorization under the Reform Act. The Appeals Board, we believe, is *mandated not only to carry out its Constitutional and judicial functions of interpreting and applying workers' compensation laws, but also to exercise its rule making powers where necessary and appropriate to implement such legislation, including the Reform Act.*" (*Alfredo Moran v. Bradford Building, Inc* (1992) 57 Cal. Comp. Cases 273, 288. Emphasis added.)

It is completely disingenuous for the Board to claim no rules exist when they themselves are the ones who have obviously refused to promulgate the rules they knew were necessary to insure due process in their court proceedings. The Board denied this Petitioner's due process rights when the Commissioner

placed himself in the shoes of the workers' compensation judge at the contempt hearing but then refused to abide by the rules governing a workers' compensation trial judge - Labor Code §5311 and Board Rule 10452.

The Board's disinterest in Petitioner's right to a fair trial (or in preserving their dignity was evident when Petitioner's subpoenaed witness, Dr. Geoffrey Miller, simply chose not to appear at the Contempt hearing. This was a direct contempt of the court, but Commissioner Cuneo flatly refused Petitioner's oral motion at the hearing to find Dr. Miller in contempt. The Board should have been outraged at Dr. Miller's affront to the dignity of the Board and the disruption of its proceedings. They were neither. Nor was the Board concerned that as Petitioner's only remaining witness, Dr. Miller was not present to testify, further preventing Petitioner from receiving a fair trial or putting on a defense.

This was not the first time this Board has shown such contempt for the law and for every citizen's Constitutional rights. This Board has historically disregarded due process in contempt proceedings before them. (See *Marcus v. Workmen's Comp. Appeals Bd.* (1973) 35 Cal.App.3d 598; *Rowen v. Workers' Comp. Appeals Bd.* (1981) 119 Cal.App.3d 633; *Morton v. Workers' Comp. Appeals Bd.* (1987) 193 Cal.App.3d 924.)

And the Board has not restricted their denial of due process to contempt proceedings. (See *Phillip Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151; *Fidelity & Casualty Company of New York v. Workers' Compensation Appeals Board* (1980) 103 Cal.App.3d 1001. See also the previous petition for review, filed by this Petitioner in this case, Supreme Court Number S125434.)

The Board's proceedings fell far short of insuring the due process that this Nation and this Court hold so dear. Their motive was to silence this

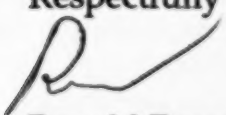
Petitioner's complaints regarding the injustices meted out to the disabled in California by a workers' compensation system that no longer insures them even the meager benefits once promised. That is offensive not only to our sense of fundamental and cherished Constitutional rights, but to our sense of human decency.

CONCLUSION

Based on the foregoing, Petitioner respectfully submits that this Petition for Writ of Certiorari be granted. The Court may wish to consider summary reversal of the decision of the Workers' Compensation Appeals Board.

Dated: May 31, 2005

Respectfully submitted,



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APPENDICES

A. California Supreme Court denial of review. (March 2, 2005).....1

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E. Findings of Fact; Order, Judgment and Decree of Contempt of the California Workers' Compensation Appeals Board (July 8, 2004) 18

Court of Appeal, Third Appellate District
No. C048264
S130990

IN THE SUPREME COURT OF CALIFORNIA

En Banc

RONALD FRYER, Petitioner,
v.

WORKERS' COMPENSATION APPEALS BOARD,
Respondent.

CORNUCOPIA COMMUNITY MARKET,
Real Party in Interest.

Petition for review DENIED.

George, C.J., was absent and did not participate.

SUPREME COURT
FILED

MAR - 2 2005
Frederick K. Ohlrich Clerk

DEPUTY

KENNARD

Acting Chief Justice

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

FILED

JAN 1 3 2005

COURT OF APPEAL-THIRD DISTRICT
DEENA C. FAWCETT

BY._____Deputy

RONALD FRYER,

Petitioner,
v.

THE WORKERS' COMPENSATION APPEALS BOARD et al,
Respondents.

C048264
Sacramento County
No. SAL75781

BY THE COURT:

The petition for writ of review is denied.
Dated: January 13, 2005

BLEASE, Acting P.J.

ec: See Mailing List

Ronald G. Fryer, Petitioner v. Workers' Compensation Appeals Board, Cornucopia Community Market, Travelers Insurance, Respondents

Civil No. C048264—Court of Appeal, Third Appellate District

70 Cal. Comp. Cases 247, 2005 Cal. Wrk. Comp. LEXIS 6

Writ of Review Denied January 13, 2005

Prior History: W.C.A.B. No. SAL 75781—WCAB Commissioner Cuneo, acting as hearing officer; WCAB Panel: Chairman Rabine, Commissioners Caplane, Brass

Subsequent History: Review Denied March 2, 2005

Disposition: Petition for writ of review denied

Counsel: For petitioner—Ronald G. Fryer, in pro per

For respondent WCAB—Special Prosecutor Judy Dick

Contempt—Proceedings Against Applicant—WCAB found applicant guilty of one count of indirect contempt under Code of Civ. Proc. § 1209(a)(l) and (8) and imposed $200 fine, when applicant, in pro per, filed several documents with WCAB that contained contemptuous language with regard to WCJ handling his case and WCAB after specific warnings by WCAB that such behavior could subject applicant to contempt

and/or sanction proceedings. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 21.09.]

Disqualification—WCAB Commissioners—Procedure—WCAB found that WCAB Commissioner selected to hear contempt proceedings against applicant had authority to find that he should not be disqualified from proceedings and that Labor Code § 134, which sets forth disqualification procedures applicable to WCJs, did not apply to Commissioner. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 26.03[2].]

Subpoenas—WCAB found that WCAB Commissioner selected to hear contempt proceedings against applicant was justified in quashing subpoena and subpoena duces tecum served by applicant, when none of testimony or documents sought by applicant was relevant in contempt proceeding. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 25.43.]

Applicant sustained an injury to his lumbar spine, cervical spine, knees, and elbows on 1/2/97, while employed as a produce clerk by Defendant Cornucopia Community Market. On 4/17/97, Applicant's employment with Defendant was terminated. On 5/30/97, Applicant filed an Application for Adjudication of Claim, alleging that his injuries were work related and seeking workers' compensation benefits.

Subsequently, Applicant, acting in pro per, filed multiple petitions for removal with the WCAB, which were denied. On 3/19/2004, the WCAB issued an Accusation, Citation, and Order to Show Cause, regarding Applicant's alleged contemptuous conduct. It was alleged in the Accusation that Applicant was

guilty of one count of contempt pursuant to Code of Civil Procedure § 1209(a) for language used in a petition for removal filed by Applicant on 10/27/2003, after failing to obey the WCAB's previous warning that such language was contemptuous. Specifically, the WCAB indicated that, in the petition, Applicant referred several times to WCJ Gregory Cleveland being "crooked" and accused him of refusing to allow Applicant the right to conduct discovery, while allowing "his crooked insurance pals the same right." The petition allegedly also contained the following language:

> No matter how you slice it Cleveland has broken the law & his Order must be removed to the Board. Cleveland's actionsin this case have been nothing short of disgraceful and an embarrassment to the Board and the people of this state who pay his exorbitant and undeserved salary.

It was alleged in the Accusation that, prior to the filing of the 10/27/2003 petition, the WCAB had issued an Order Denying Petition for Removal dated 8/28/2002, specifically warning Applicant that if he persisted in such contemptuous conduct, he might be subject to contempt and/or sanction proceedings.

The Accusation further alleged that, after the WCAB's specific contempt warning and prior to the 10/27/2003 petition, Applicant filed a petition in which he stated that:

> We know for a fact the commissioners purposely violated the law denying that earlier petition to remove because applicant filed his Response To Illegal Order Dismissing Petition For Removal on February 28, 2002 and expressly pointed out the commissioners [sic]

> failure to comply with the law regardingservice and filing. Not surprising for these "commissioners," they simply ignored that response. These so-called commissioners will have to violate some other law this time, as applicant is sure they will.

In a brief filed by Applicant on 7/31/2003, Applicant stated:

> Shelter, Travelers Insurance, QME Dr. Geoffrey Miller, Judge Thomas Clarke, and Commissioners Rabine, Casey and Burton conspired to commit insurance fraud in denying this applicant's temporary disability benefits and treatment for compensation injuries. Judge Clarke went so far as to commit perjury, as did Dr. Miller and Kevan Shelter. It is no wonder Mr. Shelter is doing anything he can to prevent the day he will have to sit on the stand and explain his part in conspiring to commit insurance fraud.

The Accusation alleged that such language, as used by Applicant in documents filed with the WCAB, came within the definition of contempt under Code of Civil Procedure § 1209(a)(l) and/or (8).

A contempt proceeding was held on 5/5/2004 before Commissioner Cuneo, pursuant to Labor Code § 134. At the proceeding. Applicant filed a petition to disqualify Commissioner Cuneo from hearing the matter. Applicant also submitted a declaration stating that Commissioner Cuneo erred in quashing various subpoenas and subpoenas duces tecum served by Applicant to compel testimony and the production of documents at the contempt proceeding.

On 7/8/2004, the WCAB issued a Findings, Order, Judgment, and Decree of Contempt in which Commissioner Cuneo found that Applicant engaged in contemptuous conduct, punishable by the publication and dissemination of the WCAB's Order of contempt and opinion. Commissioner Cuneo also imposed on Applicant a $200 fine to be paid by Applicant within 10 days of the date the Order of Contempt was issued.

Initially, Commissioner Cuneo found no basis for disqualification in this matter. With regard to the subpoenas served by Applicant, Commissioner Cuneo indicated that none of the documents or testimony sought by Applicant was relevant on the allegations being adjudicated in the contempt proceeding. Thus, he found that he was justified in quashing the subpoenas.

In his opinion, Commissioner Cuneo indicated that the instant matter presented a question of indirect contempt, since it was not committed in the WCAB's presence. He noted that there was proof beyond a reasonable doubt that Applicant was specifically warned not to persist in behavior involving the use of certain language when referring to a WCJ. However, he continued to engage in such behavior. He found that Applicant's statements regarding WCJ Cleveland and the WCAB violated Code of Civil Procedure § 1209(a)(l) and (8), in that they were disorderly, contemptuous, and insolent. Moreover, Commissioner Cuneo found that there was no denial of Applicant's right to free speech.

In imposing the $200 fine. Commissioner Cuneo pointed out that, pursuant to Code of Civil Procedure § 1218, contempt may be punished by a fine not to exceed $1,000. However, Commissioner Cuneo recognized that Applicant was representing himself in this matter and that this mitigated Applicant's

behavior. Therefore, considering the totality of the circumstances, Commissioner Cuneo found that a $200 fine was fair and reasonable.

Applicant sought reconsideration of Commissioner Cuneo's Order of contempt, contending in relevant part that: (1) the WCAB did not have jurisdiction to allege contempt under Code of Civil Procedure § 1209(a)(l) and (8); (2) the WCAB did not have jurisdiction to prosecute him for contempt because the required elements were not set forth in the WCAB's 3/19/2004 Accusation, Citation, and Order to Show Cause and because the WCAB admitted that he did not disobey any lawful order of the WCAB, nor did the WCAB indicate that he intended to disobey any lawful order; (3) the WCJ denied his constitutional right to a fair hearing and due process; (4) the WCJ acted in excess of his powers in issuing a protective order denying him of his right to depose Defendant's claims adjuster; (5) the WCJ had no jurisdiction to rule on his own disqualification or to find Applicant in contempt until the disqualification issue was heard by a three-member panel of the WCAB pursuant to Labor Code §§ 5310, 5311, and 5708 and 8 Cal. Code Reg. § 10452; (6) the WCJ erred in refusing to rule on his motion requesting an order to show cause for Dr. Geoffrey Miller's refusal to appear and testify pursuant to Applicant's subpoena; and (7) the WCJ erred in refusing to rule on his motion requesting an order to show cause for Defendant's failure to comply with a subpoena duces tecum to produce documents at the contempt hearing.

On 9/27/2004, the WCAB issued an Opinion and Order Denying Reconsideration. With respect to the merits of Applicant's contentions, the WCAB noted that, even assuming that Code of Civil Procedure § 1209(a)(l) concerns only direct contempt as alleged by Applicant, Applicant was still properly found guilty of

one count of indirect contempt, both under the WCAB's inherent power to exercise reasonable control over all proceedings before it, including the power to punish acts that embarrass or obstruct it in discharge of its duties, and under Code of Civil Procedure § 1211 (a). Here, the WCAB pointed out, Applicant was found to have committed indirect contempt because he ignored the WCAB's specific warning regarding his reference to the WCJ as a "crooked judge" and other contemptuous language. The WCAB explained to Applicant that his conduct could be the subject of contempt and/or sanction proceedings. However, Applicant continued to engage in contemptuous behavior. The WCAB acknowledged that Applicant's behavior did not constitute a disobedience of any lawful judgement or order of the WCAB, as set forth in Code of Civil Procedure § 1209(a)(5). However, the WCAB pointed out that it did not allege a violation of that section and that no such violation was found. The WCAB found that the notice given by the WCAB and the subsequent contempt proceedings satisfied Applicant's right to due process of law.

Regarding Applicant's contentions regarding disqualification of Commissioner Cuneo, the WCAB noted that there is no statutory or regulatory basis for disqualification of a Commissioner designated by the WCAB pursuant to Labor Code § 134. The procedures outlined by Applicant pertained to disqualification of a WCJ, and Commissioner Cuneo is not a WCJ.

As to Applicant's contentions regarding the quashing of the subpoena and subpoena duces tecum in this case, the WCAB agreed that Commissioner Cuneo was justified in quashing the subpoenas since none of the testimony or documents sought by Applicant was relevant in the contempt proceeding.

Applicant filed a Petition for Writ of Review, contending in essence that: (1)the WCAB violated his right to free speech and exceeded its jurisdiction by issuing an order of contempt when Applicant did not disobey a lawful WCAB order, (2) the WCAB erred in convicting Applicant of "constructive contempt" under Code of Civil Procedure § 1209(a)(l), since that section applies to direct contempt; (3) the WCAB erred in finding that Applicant was in contempt under Code of CivilProcedure § 1209(a)(8), since there was no showing that Applicant interfered with a WCAB process or proceeding, nor was there a "clear and present danger" to the administration of justice that was "serious" and "imminent"; (4) the WCAB denied Applicant's right to due process when it quashed Applicant's subpoenas without affording Applicant a hearing; (5) Commissioner Cuneo exceeded his jurisdiction and denied Applicant due process when he ruled on his own disqualification rather than allowing a three-member panel of the WCAB determine the issue; and (6) the WCAB abused its discretion in refusing to find Dr. Miller in contempt for refusal to appear and testify at the contempt proceeding pursuant to Applicant's subpoena.

WRIT DENIED January 13, 2005.

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

In Re Alleged Contempt of RONALD FRYER, Applicant, Related Matter: RONALD FRYER, vs. CORNUCOPIA COMMUNITY MARKET And TRAVELERS INSURANCE, Defendant(s). WCAB Case No. SAL 75781	Misc. No. 246 OPINION AND ORDER DENYING RECONSIDERATION

Applicant Ronald Fryer, in propria persona, seeks reconsideration of the Findings, Order, Judgment and Decree of Contempt issued by Commissioner James C. Cuneo of the Workers' Compensation Appeals Board on July 8, 2004. Commissioner Cuneo found that "[a]fter specific warning [Mr.] Fryer, in a Petition to Remove filed with the WCAB on October 27, 2003, engaged in acts and behavior that are contempts of the authority of the WCAB under Code of Civil Procedure §1209(a)1 and 8." Mr. Fryer was therefore punished "for the conduct above described in disrespect of and

contemptuous of this Board's legal process and proceedings to be effective by the publication and dissemination of the foregoing opinion, and by the imposition of a fine of $200.00 to be paid... within ten (10) days of date hereof, to the Secretary, Workers' Compensation Appeals Board, Suite 9328,455 Golden Gate Avenue, San Francisco, California 94102."1

Mr. Fryer contends that (1) the WCAB did not have jurisdiction to allege contempt under Code of Civil Procedure sections 1209(a)l and 8; (2) the WCAB did not have jurisdiction to prosecute him for contempt because "the required elements were not listed in the [WCAB's] March 19, 2004 Accusation, Citation and Order to Show Cause,' and because the WCAB admits that he did not disobey any lawful order of the WCAB, nor did the WCAB list any facts alleging intent by him to disobey any lawful order; (3) "the WCJ denied applicant his constitutional right to a fair hearing and due process in granting the special prosecutor's and the Administrative Director's motions to quash applicant's subpoenas for witnesses without affording [him] notice, [and] without considering [his] written objections to the motions and a chance to be heard on the motions;" (4) "the WCJ acted in excess of his powers in issuing a protective order denying applicant the unfettered right to depose defendant Travelers Insurance's claims representative, Miss Donna Magallanes, when no such protective order was sought by denying applicant the unfettered right to depose defendant Travelers Insurance;" (5) "the WCJ had no jurisdiction to pass on his own disqualification or to adjudge applicant in contempt until the question of the

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1 By correspondence dated July 16, 2004 and received by the WCAB on July 19,2004, Mr. Fryer enclosed a check in the amount of $200.00, stating that payment of this fine did not constitute of waiver of his right to appeal the July 8, 2004 decision.

WCJ's disqualification had been heard by a three-member panel of the [WCAB] in compliance with Labor Code sections 5310,5311 an 5708, and Section 10452 of the [WCAB's] Rules of Practice and Procedure;" (6) the WCJ erred in refusing to rule on his motion for order to show cause why Dr. Geoffrey Miller refused to appear in violation of a valid subpoena ordering his appearance to testify at contempt hearing; and (7) the WCJ erred in refusing to rule on his motion for order to show cause why Travelers Insurance failed to comply with a valid subpoena duces tecum to produce documents at the contempt hearing.

For the reasons discussed below, we will deny Mr. Fryer's petition for reconsideration.

At the outset, we note that the hearing officer assigned to this case by the WCAB is Commissioner James C. Cuneo, who is not a workers' compensation administrative law judge (WCJ) as defined by Labor Code section 123.5. Thus, Mr. Fryer's reference to Commissioner Cuneo as a "WCJ" throughout his petition is inappropriate.

With respect to the merits of Mr. Fryer's contentions, we first note even assuming arguendo that Code of Civil Procedure section 1209(a)(l) concerns only "direct contempts," i.e., those made in open court, Mr. Fryer was still properly found guilty of one count of indirect contempt, both under the WCAB's inherent power to exercise reasonable control over all proceedings before it, including that to punish acts which embarrass or obstruct it in discharge of its duties (see, e.g. *Crawford v. Workers' Comp. Appeals Bd.* (1989) 213 Cal.App.3d 156, 54 Cal.Comp.Cases 198, 202) and Code of Civil Procedure section 1209(a)(8).2 As provided by Code of Civil Procedure section 1211(a),

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2 Among the acts or omissions constituting contempt under Section 1209(a) is "8. Any other lawful interference with the process or proceedings of a court."

indirect contempt is that "not committed in the immediate view and presence of the court, or of the judge at chambers," and for which "an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers."

Here, Mr. Fryer was found to have committed indirect contempt because he chose to ignore a specific warning from the WCAB in its August 28, 2002 order denying removal, regarding his reference to the WCJ assigned to his case "as a crooked judge," etc., which was explained to him could be the subject of contempt and/or sanction proceedings,3 by subsequently referring to that judge as a crook and a crooked judge in a pleading filed on October 27,2003. However, in mitigation, because Mr. Fryer is not an attorney and more importantly is engaged in the difficult task of representing himself, Commissioner Cuneo imposed a fine of $200.00 under Code of Civil Procedure section 1218, which provides for a maximum fine of $1,000.00.

We next note that the cases of Turkington v. Municipal Court (1948) 85 Cal.App.2d 631 and Bridges v. State of California (1941) 314 U.S. 252, cited by Mr. Fryer, are not on point because they each involved out of court statements. More particularly, the alleged constructive or indirect contempt in Turkington was a resolution published in a newspaper, while Bridges concerned the publication of an alleged contemptuous telegram sent to the Secretary of Labor. Here, not only

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3 The WCAB stated: "First we note that applicant, representing himself, has referred to the WCJ as 'a crooked judge who has engaged in insurance fraud.' He also states that the commissioners who have previously participated in disposition of his petitions 'have all engaged insurance fraud in issuing their illegal prior decisions.' These statements are contemptuous. Should petitioner persist in this type of behavior, he may be subject to contempt and/or sanction proceedings. (Lab. Code §134; 5813; Cal. Code Regs.. tit. 8, §§10348, 10561)." (Emphasis added.)

were Mr. Fryer's statements contained in documents filed before the WCAB, they were made after he was placed on notice of the consequences of persisting in such behavior, the specific warning made by the WCAB in its decision of August 28,2002.

With regard to Mr. Fryer's disregard of the warning/notice given him by the WCAB, the WCAB acknowledges that it did not constitute "[Disobedience of any lawful judgment, order or process of the court," as set forth in Code of Civil Procedure section 1209(a)(5). However, the WCAB did not allege violation of that Section, and no such violation was found. Nevertheless, this notice and the subsequent contempt proceedings satisfied Mr. Fryer's right to due process of law.

Concerning Mr. Fryer's argument about the disqualification of Commissioer Cuneo, we note that there is no statutory or regulatory basis for disqualification of a commissioner designated by the WCAB pursuant to Labor Code section 134. The procedures outlined by Mr. Fryer all pertain to the disqualification of a WCJ, and as noted previously, Commissioner Cuneo is not a WCJ.

Furthermore, we concur with the quashing of the subpoenas at issue here, for the reasons set forth by Commissioner Cuneo in his decision. Commissioner Cuneo stated:

> "... The Accusation, Citation and Order to Show cause in this matter is simple and straightforward. It is alleged that Ronald Fryer in a document filed with the WCAB did engage in behavior that was contemptuous and that he had been warned not to engage in such behavior in a document previously filed with the WCAB. Either these documents are in existence, are filed with the WCAB and contain such behavior or warning or the documents are not in existence or are not filed with the WCAB or do not contain such behavior or warning. None of the

above individuals can offer relevant testimony on the allegations presented in the Accusation..

"After granting the petitions to Quash this commissioner did consider Ronald Fryer's Opposition to the Petitions to quash. The thrust of the Opposition are that the above individuals are corrupt, that they have done illegal acts and that Ronald Fryer wants to prove that they are crooks. None of this relevant to the allegations in the Accusation. Whether or not any of the above individuals are crooks is not the issue at hand."

This same rationale applies to the subpoena of Dr. Miller and the subpoena duces tecum served on Travelers Insurance Company.

In this respect, we note that the finding of contempt is a very narrow judgment, based on written submissions to the WCAB by Mr. Fryer. The contempt proceeding is not an opportunity for Mr. Fryer to litigate his underlying case and/or address the alleged persecution he apparently perceives.

Finally, we note with approval that Mr. Fryer has submitted the $200.00 fine imposed by Commissioner Cuneo, while pursuing his right to appeal. The WCAB therefore hopes that in the future Mr. Fryer will conform his behavior to the requirement of the law.

For the foregoing reasons,

IT IS ORDERED that the applicant's Petition for Reconsideration is DENIED.

WORKERS* COMPENSATION APPEALS BOARD

MERLE C.RABINE

I CONCUR,

RONNIE G. CAPLANE

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 27 2004

SERVICE BY MAIL 0N THE FOLLOWING PARTIES EFFECTED ON ABOVE DATE:

Ronald Fryer, P 0 Box 214322, Sacramento, CA 95821-0322
Judy Dick, Special Prosecutor, Workers' Compensation Appeals Board, P 0 Box 429459,

San Francisco, CA 94142-9459
James Robbins, Esq., Dept. of Industrial Relations, Division of Workers' Compensation,
455 Golden Gate A ve., 9th Floor, San Francisco, CA 94102
Kevan Shetler, 1101 South Winchester Blvd., Suite G-180, San Jose, CA 95128-3903

ed

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

In Re Alleged Contempt of: RONALD FRYER, Respondent,	Misc. No. 246
FINDINGS OF FACT: ORDER, JUDGMENT AND DECREE OF CONTEMPT	RELATED MATTER: RONALD FRYER, *Applicant,* vs CORNUCOPIA COMMUNITY MARKET AND TRAVELERS INSURANCE, *Defendants* WCAB NO. SAL 0075781

PRELIMINARY MATTERS

At the May 5, 2004 hearing Ronald Fryer filed a Petition to Disqualify Assigned Workers' Compensation Appeals Board Judge (Commissioner Cuneo). The Petition stated that it was filed under the "provisions of California Labor Code section 5311 and Workers' Compensation Appeals Board Rules of Practice and Procedure section 10452..." A Declaration was filed in support that stated the following:

Ronald Fryer declares:

"1. I am the respondent in the above-numbered case.

"2 "2. Workers' Compensation Appeals Board Judge (Commissioner James Cuneo) has a state of mind evincing enmity or bias toward Respondent.

"3. The following facts establish the above ground for disqualification:

"(a) Commissioner Cuneo, in violation of my right to due process, granted the petitions filed by Judy Dick and James Robbins seeking Orders to Quash the Subpoenas served on Commissioners Rabine, Brass and Murray; and Workers' Compensation Judges Thomas Clarke, Gregory Cleveland and Michael Hurley; and Administrative Director Richard Gannon, without waiting for & considering the objections to those petitions filed by Respondent and without affording Respondent a hearing on those petitions he'd requested.

"(b) Commissioner Cuneo, in violation of my right to due process, granted a petition filed by Kevan Shetler seeking an Order to Quash a Subpoena served on Donna Magallanes before Respondent had even been served with a copy of that petition.

(c) Commissioner Cuneo, went beyond the scope of Kevan Shetler's petition and ordered that no further attempt could be made by Respondent to compel Donna Magallanes' testimony (a party to the action) without the Commissioner's permission.

"(d) Commissioner Cuneo denied without any explanation Respondent's timely request for a continuance of the May 5th hearing to allow time for resolution of the last minute pretrial motions.

"(e) Commissioner Cuneo refused to respond to Respondent's inquiries concerning the scheduling of the hearing beyond the first day when Respondent indicated his belief the hearing would last more than one day."

This commissioner denied the Petition. This commissioner is hearing and deciding this matter pursuant to Labor Code §134 that states in part: "The appeals board or any member thereof may issue...all necessary process in proceedings for contempt..." Labor Code §5311 applies only to a workers' compensation judge. Rule 10452 (Cal. Code of Regs, tit. 8 §10452) applies only to a workers' compensation judge. The Workers' Compensation Appeals Board (hereafter referred to as WCAB) has no procedure that governs this situation. This commissioner concluded it was best to proceed with the hearing recognizing that while there was no procedure Ronald Fryer maintained his right of appeal on this issue and all other issues adversely decided.'

---

1 A Motion To Quash Subpoena For Personal Appearance Of Geoffrey Miller, M.D. was sent to the WCAB by fax late in the afternoon on May 4, 2004. This commissioner did not rule on that motion prior to the hearing on May 5, 2004 and now considers the issue moot. This commissioner would grant that motion for the same reason he granted other similar petitions to quash. Dr. Miller, with a Southern California place of business, performed services as aQME in Ronald Fryer's workers' compensation case and he would have nothing relevant to offer on the issue at hand.

This commissioner has no enmity or bias toward Ronald Fryer. This commissioner has a disagreement with Ronald Fryer as to the law. It has long been settled that errors of law by a judge, even when numerous and continuous, do not amount to bias and do not operate to disqualify him or her. (E.g., *McEwen v. Occidental Life Insurance Co.* (1916) 172 Cal. 6, 11; *Estudillo v. Security Loan & Trust Co.* (1910) 158 Cal. 66, 70; *Dietrich v. Litton Industries, Inc.* (1970) 12 Cal.App.3d 704, 719; *Shakin v. Board of Medical Examiners* (1967) 254 Cal.App.2d 102, 116; *Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 400.)

The first three statements of facts in Ronald Fryer's declaration all involve this commissioner's granting petitions to quash subpoenas served on commissioners Rabine, Brass and Murray, Workers' Compensation Judges Thomas Clark, Gregory Cleveland and Michael Hurley, Administrative Director Richard Gannon and Donna Magallanes together with a protective order without considering Ronald Fryer's Oppositions and without a hearing.

This commissioner did so grant the petitions to quash. The Accusation, Citation and Order to Show Cause in this matter is simple and straightforward. It is alleged that Ronald Fryer in a document filed with the WCAB did engage in behavior that was contemptuous and that he had been warned not to engage in such behavior in a document previously filed with the WCAB. Either these documents are in existence, are filed with the WCAB and contain such behavior or warning or the documents are not in existence or are not filed with the WCAB or do not contain such behavior or warning. None of the above individuals can offer relevant testimony on the allegations presented in the Accusation.

After granting the petitions to Quash this commissioner did consider Ronald Fryer's Opposition to the Petitions to quash. The thrust of the Oppositions are that the above individuals are corrupt, that they have done illegal acts and that Ronald Fryer wants to prove that they are crooks. None of this is relevant to the allegations in the Accusation. Whether or not any of the above individuals are crooks is not the issue at hand.

Ronald Fryer's fourth statement in his declaration gives no basis for a disqualification. Ronald Fryer made an August 27, 2004 fax request for continuance of a hearing set for May 5, 2004 in order to hold a hearing on his Oppositions. This commissioner in his discretion denied that request by fax of April 30, 2004 and informed Ronald Fryer that he may make such further motion and arguments at the hearing. As stated above there was no basis for a hearing on the Opposition to the petitions to quash as this commissioner had granted said petitions. It is noted Ronald Fryer did not renew his motion for continuance at the May 5, 2004 hearing.

Lastly Ronald Fryer complains that this commissioner refused to respond to Ronald Fryer's request for scheduling of a hearing beyond the first day when he indicated a belief that the hearing would take more than one day. That request is in the same August 27, 2004 fax request that involved a continuance. Not responding to a party's request as to whether there could be more days of hearing is not a basis for disqualification. Furthermore it shows no enmity or bias. There is no way this commissioner could know whether there would be one day or more of hearings in this matter until the first day of hearing commenced.

At the close of the May 5, 2004 hearing Special Prosecutor Judy Dick made a motion that this commissioner issued a specific order that Ronald Fryer

cease and desist from using contemptuous, inciting, intimidating and insulting language in documents that he files with the WCAB (See Reporter's transcript of May 5, 2004 hearing p. 38, lines 5-9) That motion was taken under advisement allowing Ronald Fryer 30 days to reply. He has not replied to this specific motion. However this commissioner denies the motion subject to the Special Prosecutor's right to bring this or any similar motion in the future should the record demand it. This commissioner entertains the hope that the below provided punishment will give Ronald Fryer sufficient reason to proceed with his underlying workers' compensation case without engaging in contemptuous behavior.

Subsequent to the May 5, 2004 hearing Ronald Fryer filed the following Petitions to Remove:

"1. Petition to Remove Commissioner Cuneo's Order Granting Motion to Quash Subpoena Served on Commissioner Frank M. Brass.

"2. Petition to Remove Commissioner Cuneo's Order Granting Motion to Quash Subpoena Served on Commissioner Janice J. Murray.

"3 Petition to Remove Commissioner Cuneo's Order Granting Motion to Quash Subpoena (Served on Donna Magallanes); Objection to Motion to Quash Subpoena for Personal Appearance and Subpoena Duces Tecum; and Motion for Order to Show Cause.

"4. Petition to Remove Commissioner Cuneo's Order Granting Motion to Quash Subpoena Served on Commissioner Merle Rabine.

"5. Petition to Remove Commissioner Cuneo's Order Granting the Petition to Quash the Subpoenas Served on Michael J. Hurley, Gregory P. Cleveland and Thomas E. Clarke.

"6. Petition to Remove Commissioner Cuneo's Order Granting the Petition to Quash the Subpoena Served on Richard P. Gannon.

"7. Petition for Removal of Commissioner Cuneo's Denial of Petition to Disqualify Assigned Workers' Compensation Appeals Board Judge (Commissioner James Cuneo)."

The authority for the WCAB's power of removal is found in Labor Code §5310 and Rule 10843 (Cal. Code of Regs, tit. 8, §10843). That authority on its face does not apply to the instant matter. Ronald Fryer does have a right to seek appeal of this commissioner's rulings and his findings of fact and orders by either filing a petition for reconsideration pursuant to Labor Code §5900 to the WCAB or a petition for writ of certiorari directly to the District Court of Appeals. (*Rowen v. Workers' Comp. Appeals Bd.* (1981) 119 Cal.App.3d 633 [46 Cal.Comp.Cases 34]).

STATEMENT OF FACTS

This matter came on for hearing on Wednesday, May 5, 2004 before WCAB Commissioner James C. Cuneo. Present were the respondent, Robert Fryer and WCAB Special Prosecutor Judy Dick.

No testimony was offered. Documents consisting of WCAB Exhibit 1 were accepted into evidence. WCAB Exhibit 1 includes:

"[Fax Message to Ronald Fryer; handwritten Petition to Remove Judge Cleveland's Order to Show Cause Motion Denial (10-27-03); Opinion and Order Denying Petition for Removal (8-28-02); petition to Remove Judge Hurley's Order Quashing Subpoena (7-27-02); Petition to Quash Subpoena Re Andrew H. Nash, WCALJ, by James M. Robbins (7-22-02) with two attachments by Judge Hurley; Petition to Remove Judge Hurley's Order Granting Defendant's Motion to Quash Subpoena Duces Tecum (1-11-03); Reply to Objection to 7-11-03 Declaration of Readiness to Proceed and Request for Expedited hearing (7-27-03); Reply to Answer to Second Petition to Compel QME Orthopedic Evaluation Pursuant to Labor Code Section 4067 (7-31-03); letter to Michael J. Hurley, WCALJ, by Ronald Fryer (11-18-02); Second Petition Requesting WCAB Seek Order to Show Cause from Superior Court (5-29-03); Applicant's Reply to Dr. Miller's Responses to Applicant's Petition Requesting WCAB OTC from Superior Court (6-12-03) with attachment.]"

In addition judicial notice under Evidence Code §§ 450, 451 (a), 452 (d) and 453 was taken of the following: 1) the documents and WCAB orders in the workers' compensation case of Ronald Fryer v. Cornucopia Community Market and Travelers Insurance, (Case No. SAL 007578) referred to as allegations and set forth in the Accusation, Citation and Order to show Cause in Misc. 246, e.g., the October 27, 2003 petition for removal filed by Mr. Ronald Fryer, in propria persona; the Appeals Board Order Denying Removal based on that petition; the Appeals Board Order Denying Removal dated August 28, 2002; the petition filed by Mr. Ronald Fryer, in Propria Persona, with the Appeals Board on January 13, 2003, entitled "Petition to Remove Judge Hurley's Order Granting Defendant's Motion to Quash Subpoena Duces Tecum;

and the brief, filed with the Appeals Board on July 31, 2003, entitled "Reply to Objection to 07/11/03 Declaration of Readiness to Proceed and Request for Expedited Hearing;" and 2) the following documents: Mr. Fryer's letter, dated November 18, 2002, to the workers' compensation administrative law judge; a petition filed by Mr. Fryer with the Appeals Board on May 29, 2003, entitled "Second Petition Requesting WCAB Seek Order to Show Cause From Superior Court;" a brief filed by Mr. Fryer with the Appeals Board on June 12, 2003, entitled "Applicant's Reply to Dr. Miller's Response to Applicant's Petition Requesting WCAB OTC from Superior Court;" and a brief filed by Mr. Fryer with the Appeals Board on July 31, 2003, entitled "Reply to Objection to 07/11/03 Declaration of Readiness to Proceed and Request for Expedited Hearing.: "(Reporter's transcript of May 5, 2004 hearing p. 31, line 13-p. 32)

On March 19, 2004 the WCAB issued an ACCUSATION, CITATION AND ORDER TO SHOW CAUSE In Re Alleged Contempt of: Ronald Fryer.

It was alleged in that Accusation that Ronald Fryer was guilty of one count of contempt pursuant to Code of Civil Procedure section 1209 (a) 1 and/or 8 for language used in a petition for removal filed with the WCAB on October 27, 2003 after failing to obey the WCAB's warning that such language was contemptuous.

Specifically it was alleged that Ronald Fryer, in propia persona, filed a petition for removal on October 27, 2003 containing the following language:

"Signed by the crooked judge,"

* * *

"this crooked Cleveland,"

* * *

"the crooked Cleveland judge,"

and accuses him of refusing to allow applicant the right to conduct discovery, "while allowing his crooked insurance pals the same right."

The October 27, 2003 petition allegedly also contained the following language:

> "No matter how you slice it Cleveland has broken the law & his Order must be removed to the Board. Cleveland's actions in this case have been nothing short of disgraceful and an embarrassment to the Board and the people of this state who pay his exorbitant and undeserved salary."

It was alleged that prior to the filing of this petition the WCAB in an Order Denying Petition for Removal, dated August 28, 2002, gave Ronald Fryer the following specific warning regarding statements he made about a workers' compensation administrative law judge in his petition for removal:

> "First, we note that applicant representing himself, has referred to the WCJ as 'a crooked judge who has engaged in insurance fraud.' He also states that the commissioners who have previously participated in disposition of his petitions 'have all engaged in insurance fraud in issuing their illegal prior decisions.' *Should the petitioner persist in this type of behavior, he may be subject to contempt and/or sanction proceedings.* (Labor Code §134; 5813; Cal. Code of Regs. tit. 8, §§10348.10561.)"

It is also alleged that after the WCAB's specific contempt warning and prior to the October 27, 2003 petition, Ronald Fryer made the following statements in written documents filed with the WCAB:

(a) In a petition, filed on January 13, 2003, entitled "Petition to Remove Judge Hurley's Order Granting Defendant's Motion to Quash Subpoena Duces Tecum," Ronald Fryer stated:

"We know for a fact the commissioners purposely violated the law denying the earlier petition to remove because applicant filed his Response To Illegal Order Dismissing Petition For Removal on February 28, 2002 and expressly pointed out the commissioners failure to comply with the law regarding service and filing. Not surprising for these 'commissioners,' they simply ignored that response. These so-called commissioners will have to violate some other law this time, as applicant is sure they will."

(a) In a brief, filed on July 31, 2003, entitled "Reply To Objection to 07/11/03 Declaration of Readiness to Proceed and Request for Expedited Hearing," Ronald Fryer stated:

"Shelter, Travelers Insurance, QME Dr. Geoffrey Miller, Judge Thomas Clarke, and Commissioners Rabine, Casey and Burton conspired to commit insurance fraud in denying this applicant's temporary disability benefits and treatment for compensation injuries. Judge Clarke went so far as to commit perjury, as did Dr. Miller and Kevan Shelter. It is no wonder Mr. Shelter is doing anything he can to prevent the day he will have to sit on the stand and explain his part in conspiring to commit insurance fraud."

* * *

"this crooked judge..."

It as further alleged that such language, used in documents filed with the WCAB, comes within the definition of contempt, as articulated in Code of Civil Procedure Section 1209 (a) 1 and/or 8.

Among the documents in WCAB Exhibit 1, introduced into evidence on May 5, 2004 was the petition to remove filed October 27, 2003 and the Order Denying Petition For Removal dated August 28, 2002.

On page 1 of the August 28, 2002 Order Denying Petition For Removal is the following statement:

> "First we note that applicant, representing himself, has referred to the WCJ as 'a crooked judge who has engaged in insurance fraud.' He also states that the commissioners who have previously participated in disposition of his petitions 'have all engaged in insurance fraud in issuing their illegal prior decisions.' These statements are contemptuous. Should the petitioner persist in this type of behavior, he may be subject to contempt and/or sanction proceedings. (Lab. Code §§ 134. 5813; Cal. Code Regs., tit. 8 §§ 10348,10561.)"

The petition to remove, filed by Ronald Fryer on October 27, 2003 contains the following language on pages 1 and 3:

"signed by the crooked judge..."

* * *

"This crooked Cleveland..."

* * *

"the crook Cleveland..."

Ronald Fryer on page 3 also stated:

"Again, he could not deny this applicant the right to conduct discovery while allowing his crooked insurance pals the same right..."

And Ronald Fryer on page 4 stated:

> "No matter how you slice it Cleveland has broken the law & his Order must be removed to this Board. Cleveland's actions in this case have been nothing short of disgraceful and an embarrassment to the Board and the people of this state who pay his exorbitant and undeserved salary..."

Also in Exhibit 1 is the "Petition to Remove Judge Hurley's Order Granting Defendant's Motion to Quash Subpoena Duces Tecum," filed January 13, 2003 with the above quoted language as alleged in the Accusation.

DISCUSSION

In California all contempt proceedings are quasi-criminal in nature. (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 [141 Cal.Rptr. 133, 569 P.2d 727]; see *Hustedt v. Workers' Comp. Appeals Bd*: (1981) 30 Cal.3d 329, 347, fn. 15 [46 Cal.Comp.Casess 1284, 178 Cal.Rptr. 801, 636 P.2d 1139].) Generally, administrative agencies are not empowered to adjudge contempt unless such power is expressly conferred by statute. (See Cal. Administrative Hearing Practice (Cont.Ed.Bar 1984) §2.98, p. 131.)

It is well settled that the WCAB is a tribunal of limited jurisdiction with no powers beyond those conferred upon it by section 4 of article XIV of the California Constitution and the provisions of the Labor

Code. (*Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 970 [49 Cal.Comp.Cases 288, 200 Cal.Rptr. 762]; *Marcus v. Workmen's Comp. Appeals Bd.* (1973) 35 Cal.App.3d 598, 602.)

The legislature has vested the WCAB with the power to punish contempt (*Rowen v.Workers' Comp. Appeals Bd.*, supra, 119 Cal.App.3d 633, 639; *Marcus v. Workmen's Comp.Appeals Bd.*, supra, 35 Cal.App.3d at p. 604) in Labor Code section 134, which provides: "The appeals board or any member thereof may issue ... all necessary process in proceedings for contempt, in like manner and to the same extent as courts of record. . . ." (See *Hustedt v. Workers' Comp. Appeals Bd.*, supra, 30 Cal.3d at p. 345.)

Thus, the WCAB must follow the applicable provisions of the Code of Civil Procedure pertaining to contempts (Code Civ. Proc. §1209 et seq.). (*Rowen v. Workers' Comp. Appeals Bd.*, supra, 119 Cal.App.3d at p. 643.) Accordingly, when the contempt is not committed in the WCAB's presence, the WCAB must proceed by way of order to show cause supported by affidavit or statement of facts (Code Civ. Proc. §§1211,1212; *Rowen v. Workers' Comp. Appeals Bd.*, supra, 119 Cal.App.3d at p. 639); and the alleged contemner "is entitled to appear before and be heard by the tribunal which pronounces judgment upon him [citation]." (*Marcus v. n Workers' Comp. Appeals Bd.*, supra, 35 Cal.App.3d at p. 605; see *Arthur v. Superior Court* (1965) 62 Cal.2d 404, 408-409 [42 Cal.Rptr. 441, 398 P.2d 777].)

The instant matter presents a question of one count of contempt that is indirect contempt since it was not committed in the WCAB's presence. Pursuant to Code of Civil Procedure §1211 (a) an affidavit or statement of facts must be presented to the court. As set out in the above statement of facts there is proof beyond a reasonable doubt that Ronald Fryer was specifically warned not to persist in the type of behavior involving the use of certain language when

referring to a workers' compensation administrative law judge and that he then persisted with such behavior. Ronald Fryer could have complied with the WCAB's warning by simply not using the language he persisted in using.

Ronald Fryer choose instead to violate the WCAB's inherent authority to maintain its dignity and insure the orderly administration of justice. (See *Crawford v. Workers' Comp. Appeals Bd.* (1989) 213 Cal. App.3d 156 [54 Cal. Comp. Cases 198])

Specifically he was told not to refer to a judge "as a crooked judge" in a WCAB Order dated August 28, 2002. Thereafter in two documents he engaged in the same behavior that was explained to him could be the subject of contempt and/or sanction proceedings. In a document filed on October 27, 2003 he specifically referred to an administrative law judge as crook or as a crooked judge.

I find that his behavior in and of itself, consisting of using such statements after specific warning, is contemptuous conduct without consideration as to the truth of the statements.

These acts and behavior violate Code of Civil Procedure §1209 (a) 1 and 8 in that the statements used are disorderly, contemptuous, and insolent behavior toward both Workers' Compensation Judge Cleveland and the WCAB and the statements have interfered with the proceeding and process of this Board.

The statements are "scandalous in language and character assailing the integrity of the judge..." *Blodgett v. Superior Court* (1930) 210 Cal. 1.

The use of impertinent, scandalous, insulting or contemptuous language reflecting on the integrity of the court or individual judge in briefs filed with the court (*In Re Philbrook* (1995),105 Cal. 471), in petitions for hearing (*Ruby v. Superior Court* (1951) 104 Cal. App.2d.175), in points and authorities (*Blodgett v. Superior Court* (1930) supra.), in affidavits (*Hallinan v.*

Superior Court (1938) 27 CalApp.2d 433) and/or in false affidavits accusing a judge of misconduct (*Lamberson v. Superior Court* (1907) 151 Cal. 458), or where the integrity of the judge is attacked and contains defamatory matter (*Lamberson v. Superior Court, supra; In Re Cunha* (1932) 132 Cal.App. 625); *Wooley v. Superior Court* (1937) 19 Cal.App.2d 611) constitutes contempt of court.

Moreover there has been no denial of Ronald Fryer's constitutional right to free speech. His citation of *Dailey v. Superior Court* (1896) 112 Cal. 94 if anything supports the WCAB's findings herein. As opposed to circumstances in *Dailey, supra.*, herein there was no order restricting Ronald Fryer's freedom of speech. Herein there was a warning that certain behavior including language used may subject him to contempt and/or sanction proceedings. As stated in *Dailey, supra.* At page 97:

> "The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, or publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes."

Ronald Fryer is now being held accountable for his behavior.

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PUNISHMENT

Pursuant to Code of Civil Procedure §1218 contempt may be punished by a fine not exceeding $1,000.00. Ronald Fryer has committed a contemptible offense

after a specific warning. Ronald Fryer choose to engage in such behavior. His actions are serious and flagrant and on their face meant to challenge the authority of the WCAB. He has offered no excuse and no apology. At first blush it would appear that he is deserving of the full amount of the punishment allowed under the law. But this commissioner acknowledges that Ronald Fryer is not an attorney and more importantly is engaged in the difficult task of representing himself. While this does not excuse his behavior it mitigates it. Considering the totality of the circumstances of this matter I find that a fair and reasonable punishment is a fine of $200.00. Ronald Fryer is encouraged not to engage in such behavior as has resulted in this finding of contempt and he is put on notice that if he does so engage in this type of behavior he could be again subject to contempt and/or sanction proceedings.

For the foregoing reasons, the following Findings and Orders are made:

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FINDINGS OF FACT

After specific warning, Ronald Fryer, in a Petition to Remove filed with the WCAB on October 27, 2003 engaged in acts and behavior that are contempts of the authority of the WCABunder Code of Civil Procedure §1209 (a) 1 and 8.

ORDER, JUDGMENT AND DECREE OF CONTEMPT

It is ORDERED, ADJUDGED AND DECREED that Ronald Fryer be and he is hereby, PUNISHED for the conduct above described in disrespect of and contemptuous of this Board's legal process and proceedings to be effective by the publication and dissemination of the foregoing opinion, and by the imposition of a fine of $200.00 to be paid by Ronald Fryer within ten (10) days of date hereof, to the Secretary, Workers' Compensation Appeals Board, Suite 9328, 455 Golden Gate Avenue, San Francisco, California 94102.

JAMES C. CUNEO, Commissioner

SERVICE B Y MAIL AS FOLLOWS:

JUL 0 8 2004

Ronald Fryer, P 0 Box 214322, Sacramento, CA 95821 0322, In Propria Persona:

Judy Dick, Special Prosecutor, Workers' Compensation Appeals Board, P.O. Box 429459, San Francisco, CA 94142-90459

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